Office-Supreme Court, U.S.
FILED
SEP 10 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-2213

In the Supreme Court of the United States

OCTOBER TERM, 1980

WEST GULF MARITIME ASSOCIATION, PETITIONER

v.

FEDERAL MARITIME COMMISSION AND
UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

C. JONATHAN BENNER
General Counsel

EDWARD G. GRUIS
Deputy General Counsel

CLARE R. DONELAN
Attorney
Federal Maritime Commission
Washington, D.C. 20573

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1. Petitioner contends that the tariffs of seven Texas ports are inconsistent with Texas law and therefore are unjust and unreasonable in violation of Section 17 of the Shipping Act of 1916, 46 U.S.C. 816. The ports are state or municipal government agencies who operate terminal facilities on the Texas Gulf Coast.[1] They are required by Texas law to levy fees for the use of the port's facilities that are sufficient to cover expenses (Pet. App. 28). Petitioner is a trade association representing, among others, vessel agents (*id.* at 27)—the local agents of vessels' owners and operators (*id.* at 36). The tariffs challenged in this Court make vessel

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[1]Those ports, intervenors here, are the Port of Houston Authority, the City of Galveston, the Port of Beaumont, the Port of Port Arthur, the Port of Corpus Christi, the Brownsville Navigation District, and the Orange County Navigation and Port District.

agents liable for certain charges—dockage, shed and pier use, wharfage, and outbound cargo demurrage—which, petitioner asserts, should be levied only against the vessels themselves or the cargo interests (*id.* at 29-30).[2]

Petitioner challenged the tariffs in a proceeding before the Federal Maritime Commission. After a full evidentiary hearing, the administrative law judge rejected petitioner's claim. He found that the ports hold vessel agents liable "[p]recisely because [the] agents are local" (Pet. App. 36) while the owners or operators might be hard to find (see *id.* at 37). He also found that vessel agents, aware that they will be held responsible for charges, carefully investigate a principal's credit worthiness before agreeing to be its agent and often insist on advances from their principals (*id.* at 36-37). He concluded that the tariffs did not impose an "undue or unfair burden on" the agents (*id.* at 41). He then considered and rejected petitioner's argument that the tariffs made the agents liable for the vessels' debts in violation of the Texas Statute of Frauds (*id.* at 76; footnote and citation omitted):

> [T]he Statute of Frauds is never brought into play. These tariffs, which make agents liable for payment of vessel charges, impose that liability directly on the agents as users--and--having used the facilities provided by the ports, the agents accept the terms of the tariff. * * * Thus, none of the tariff provisions call for vessels agents to answer for the debt of another. The debt they pay is their own.
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> Moreover, the Commission has held that "while tenets of state and common law may be evidence of reasonableness and of local business practices, they are not alone dispositive of Shipping Act issues, absent a

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[2]Petitioner challenged other tariffs below but does not renew those claims here.

> showing that these principles directly apply to Shipping Act considerations." * * * [Petitioner] has made no such showing here.

The administrative law judge accordingly found that the tariffs were not unreasonable or unjust in violation of the Shipping Act (*id.* at 80).

The Federal Maritime Commission adopted the administrative law judge's decision (Pet. App. 21), concluding that "the port charges for which the vessel agents are made liable are reasonably related to the vessel interests' use of the ports, and are therefore reasonably borne by the vessel agents" (*id.* at 19). The Commission added that it agreed with the administrative law judge's conclusion that "the statute of frauds issue raised by [petitioner] is inapplicable and is not controlling absent a showing that the state law principles directly apply to Shipping Act considerations" (*ibid.* n.5).

The court of appeals upheld the Commission's order. It said (Pet. App. 114):

> In determining whether tariffs are "just" under Section 17 the Commission in some circumstances may consider state law. In this case the Commission did consider Texas law, but concluded that the provisions were not contrary to that state law. We agree and therefore affirm the Commission's holding that the tariff provisions in question are "just and reasonable" under Section 17.

2. Petitioner now claims simply that the tariffs are unjust under Section 17 of the Shipping Act because they violate Texas law. This is essentially the same claim that petitioner made, and the Court declined to review, in *West Gulf Maritime Association* v. *Port of Houston Authority*, 610 F. 2d 1001 (D.C. Cir. 1979), cert. denied, No. 79-1646 (Oct. 6, 1980). It is no more worthy of review now. Petitioner

claims a right under the Shipping Act of 1916. The interpretation of that federal statute is a matter of federal law; state law is relevant only to the extent that federal law incorporates it. Accordingly, *Erie R.R.* v. *Tompkins*, 304 U.S. 64 (1938), relied on by petitioner, is inapplicable. For the reasons given in the opinions of the administrative law judge and the Commission, and in our Memorandum in Opposition in *West Gulf Maritime Association* v. *Port of Houston Authority, supra*—reasons with which petitioner does not now quarrel, except to make the unsupported assertion that they are not "substantial" enough (Pet. 13)—the Commission had more than a sufficient basis for finding the challenged tariffs just and reasonable. The Commission has consistently interpreted Section 17 to refer to other considerations besides lawfulness under state law. See, *e.g.*, *Agreement No. T-1870: Terminal Lease Agreement at Long Beach, California*, 11 F.M.C. 12, 26 (1967); *Agreement No. T-4: Terminal Lease Agreement at Long Beach, California*, 8 F.M.C. 521, 533-534 (1965). Petitioner has shown no reason to believe that Congress, in passing the Shipping Act, intended state law to control the definition of "just" and "reasonable."

Even if state law did control, the Commission and the court of appeals determined that the tariffs are legal under state law and this Court would not ordinarily review that determination. Sup. Ct. R. 17.1; *Huddleston* v. *Dwyer*, 322 U.S. 232, 237 (1944). Moreover, petitioner's state law arguments appear to be incorrect. Petitioner asserts that under the Texas Statute of Frauds a promise to pay for the debt of another is unenforceable unless it is in writing, and that an agent is generally not liable on a contract he enters into for the benefit of his principal. But these rules of Texas law make the agents' obligations unenforceable only if the sole basis of the obligations is the agents' liability as guarantors of the ports' claims against the principals. In fact, the

agents' liability is based not on contracts between the ports and the principals but—as the administrative law judge noted—on the contracts that the agents form on their own behalf with the ports when they take advantage of the ports' facilities.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

C. JONATHAN BENNER
General Counsel

EDWARD G. GRUIS
Deputy General Counsel

CLARE R. DONELAN
Attorney
Federal Maritime Commission

SEPTEMBER 1981

DOJ-1981-09